

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DONALD WAYNE DAILEY,

Defendant-Appellant.

UNPUBLISHED

January 18, 2000

No. 211213

Kent Circuit Court

LC No. 97 005682-FH

Before: Sawyer, P.J., and Gribbs and McDonald, JJ.

PER CURIAM.

Defendant appeals as of right from his conviction of third-degree criminal sexual conduct, MCL 750.520(d)(1)(b); MSA 28.788(4)(1)(b), for which he was sentenced to a prison term of six to twenty years. We affirm.

The case stems from defendant's contact with the victim on February 20, 1997, and into the early morning of February 21, 1997. The victim testified that, although she told him no, defendant put his penis in her mouth. In fact, the victim testified that she bit defendant's penis in response, allowing her to get out of the bedroom where the incident took place. The jury ultimately found defendant guilty of penetration by force.

I

Defendant's first issue concerns whether the trial court erred when it admitted the hearsay testimony of Officer French in regard to the statements made by the victim. Specifically, defendant contends that the foundational requirements for the excited utterance exception had not yet been met when the trial court admitted the statements. We review a trial court's decision to admit evidence under an abuse of discretion standard. *People v Nelson*, 234 Mich App 454, 460; 594 NW2d 114 (1999) (citing *People v Lugo*, 214 Mich App 699, 709; 542 NW2d 921 (1995)).

Generally, MRE 803(2) provides an "excited utterance" exception to hearsay where there is a "statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." Our Supreme Court has held that a trial court's

determination whether a declarant was “still under the stress of the event is given wide discretion.” *People v Smith*, 456 Mich 543, 551; 581 NW2d 654 (1998) (citing McCormick, Evidence (3d ed), § 297, p 857). Defendant contends that the trial court erred in admitting the statements because at the time of their admission, no independent evidence of the startling event giving rise to the excited utterance had been presented to the court. Defendant further argues that the statements were inadmissible because there was insufficient proof that the statements were made before there was time to reflect or misrepresent. We disagree.

Our Supreme Court has ruled that in the absence of independent proof that a startling event occurred, a declarant’s excited utterance is not admissible. *People v Burton*, 433 Mich 268, 294; 445 NW2d 133 (1989). Defendant does not dispute that the victim’s testimony provided evidence of the startling event independent of the statements testified to by Officer French. His only contention is that Officer French’s testimony regarding the statements of the victim preceded the testimony of the victim. The controlling statutory provision states:

No judgment or verdict shall be set aside or reversed or a new trial be granted by any court of this state in any criminal case, on the ground of misdirection of the jury, or the improper admission or rejection of evidence, or for error as to any matter of pleading or procedure, unless in the opinion of the court, after an examination of the entire cause, it shall affirmatively appear that the error complained of has resulted in a miscarriage of justice. [MCL 769.26; MSA 28.1096.]

In reference to that statute, our Supreme Court stated:

In other words, the effect of the error is evaluated by assessing it in the context of the untainted evidence to determine whether it is more probable than not that a different outcome would have resulted without the error. Therefore, the bottom line is that § 26 presumes that a preserved, nonconstitutional error is not a ground for reversal unless "after an examination of the entire cause, it shall affirmatively appear" that it is more probable than not that the error was outcome determinative. [*People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999).]

In light of the fact that the victim’s testimony did provide independent proof of the startling event leading to the excited utterance, any error in the admission of the victim’s statements to Officer French was not outcome determinative. Therefore defendant does not provide a ground for reversal of his conviction.

Regarding defendant’s contention that there was insufficient proof that the statements were made before there was time to reflect or misrepresent, we note that Officer French testified that the incident occurred sometime between ten and twenty minutes after midnight, while he arrived at 12:44 a.m. Moreover, he testified that the victim had tears in her eyes, and took some time to calm down. Accordingly, we do not believe that the trial court abused its discretion in concluding that a startling event had taken place, and that the declarant was still under the stress of excitement caused by the event. Therefore, we conclude that the trial court did not err in admitting the statement made by Officer French because a proper foundation existed for an excited utterance exception to the hearsay rule.

II

Defendant's second claim of error is that the trial court erred in permitting the prosecution to introduce a partial confession of defendant before the corpus delicti of the offense was established. A review of the record reveals that defendant did not object to the prosecution's introduction of this evidence during the hearing. Thus, this issue was forfeited. Our Supreme Court recently held that a reviewing court may reverse on the basis of a forfeited, nonconstitutional error "only when the defendant is actually innocent or the error seriously affected the fairness, integrity, or public reputation of judicial proceedings." *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999).

In the instant matter, defendant does not dispute that the corpus delicti of the crime was introduced by the victim's testimony after defendant's purported confession. The victim specifically testified as to both force and penetration—the essential elements of the crime. Thus, the issue is one of timing. Had defendant objected to the arguably premature introduction of the admission, the admission could easily have been delayed to follow the victim's testimony. Therefore, we conclude that these facts are insufficient to establish an error requiring reversal under *Carines*.

III

Defendant's third claim of error is that the trial court erred by denying defendant's motion for a mistrial where the victim testified during direct examination by the prosecution that defendant had been in jail. We reject this argument for several reasons. First, this Court has held that "an isolated or inadvertent reference to a defendant's prior criminal activities" would not justify reversal. *People v Wallen*, 47 Mich App 612, 613; 209 NW2d 608 (1973) (citing *People v McNutt*, 220 Mich 620; 190 NW 750 [1922]). In *Wallen*, this Court found an error requiring reversal where the prosecution deliberately and repeatedly made efforts to inform the jury of the defendant's prior convictions. *Wallen, supra* at 613.

Similarly, this Court held that where mention of a prior conviction was volunteered by a witness in response to an appropriate question, the brief and incidental nature of the reference did not justify a mistrial. *People v Griffin*, 235 Mich App 27, 37; 597 NW2d 176 (1999) (citing *People v Haywood*, 209 Mich App 217, 228; 530 NW2d 497 [1995]). The *Griffin* Court noted that the informant's testimony regarding the defendant calling him from prison resulted from proper questioning regarding the informant's contacts with the defendant. *Griffin, supra* at 36.

Generally, we review a trial court's decision regarding a motion for mistrial for an abuse of discretion. *Griffin, supra* at 36 (citing *Haywood, supra* at 228). Specifically, the *Griffin* Court noted that a "mistrial should be granted only for an irregularity that is prejudicial to the rights of the defendant and impairs his ability to get a fair trial." *Griffin, supra* at 36 (citing *Haywood, supra* at 228). In the instant matter, the trial court noted the propriety of the prosecution's question in regard to the victim's contacts with defendant since the incident. In fact, an issue raised during the hearing involved defendant's knowledge of the victim's allegation regarding the biting. Thus, there was relevancy to the prosecution's inquiry into the contacts, and in light of the factual similarity to *Griffin*, we do not believe the trial court abused its discretion in finding the prosecution's questioning proper.

Moreover, we do not believe that an inquiry into the physical contacts between defendant and the victim rises to the level of deliberate and repeated efforts to inform the jury of defendant's prior convictions under *Wallen*. Rather, the situation is more analogous to the brief and incidental mention of prior incarceration in *Griffin*. It should be noted that although the trial court concluded that the reference was "innocuous," the jury was specifically instructed to not consider any mention of the prior incarceration. Furthermore, we believe that the trial court correctly placed some emphasis on the fact that defendant's own witness, Robert Grover, testified that he had known defendant since "he got out." Based on these facts and the case law cited above, we believe that the trial court did not abuse its discretion when it concluded that the victim's testimony did not deprive defendant of a fair and impartial trial.

IV

Defendant's final claim of error is that he was denied a fair trial by repeated instances of prosecutorial misconduct. Specifically, defendant contends that: (i) the prosecution's repeated references to evidence as unrefuted improperly shifted the burden of proof to defendant; (ii) the prosecution improperly vouched for the credibility of Officer French and the victim; and (iii) even if the above contentions fail to merit reversal separately, in combination there is sufficient prosecutorial misconduct to merit reversal.

As a preliminary matter, it should be noted that defendant did not object to the prosecution's statements which allegedly vouched for the credibility of the witnesses. Although the general standard for prosecutorial misconduct is whether the defendant was denied a fair and impartial trial, our review of this issue "is precluded unless a curative instruction could not have eliminated the prejudicial effect or the failure to consider the issue would result in a miscarriage of justice." *People v Avant*, 235 Mich App 499, 508, 512; 597 NW2d 864 (1999) (citing *People v Green*, 228 Mich App 684, 692-692; 580 NW2d 444 [1998], and *People v Nantelle*, 215 Mich App 77, 86-87; 544 NW2d 667 [1996]). On the other hand, defendant objected to the prosecution's closing argument in regard to the alleged shifting of the burden of proof.

As a general rule, the prosecution may not vouch for the credibility of witnesses. *People v Ramsdell*, 230 Mich App 386, 404; 585 NW2d 1 (1998) (citing *People v Howard*, 226 Mich App 528, 548; 575 NW2d 16 [1997]). The *Ramsdell* Court held that the prosecutorial remarks did not vouch for the credibility of witnesses where they merely explained why the correctional officers would be more alert than others to observe certain occurrences described in their testimony. *Ramsdell, supra* at 404. In the instant matter, the prosecutor's comments were of a similar nature. Further, although a curative instruction was not requested because defendant failed to object, the trial court did caution the jury to consider witness credibility equally and not place too much weight on the testimony of a police officer. Accordingly, we do not believe that a miscarriage of justice has resulted based on this specific ground.

As to the burden of proof shifting, we review the prosecution's remarks to determine whether defendant was denied a fair and impartial trial. We note that the prosecution reminded the jury on redirect examination that the burden of proof was on the prosecution to prove beyond a reasonable

doubt what happened. Moreover, the trial court instructed the jury that because of the presumption of innocence, “no defendant has to produce any evidence to prove his innocence.”

Furthermore, this Court has held that if a defendant advances evidence or a theory, “argument with regard to the inferences created does not shift the burden of proof.” *People v Godbold*, 230 Mich App 508, 521; 585 NW2d 13 (1998) (citing *People v Fields*, 450 Mich 94, 115; 538 NW2d 356 [1995]). Along the same lines, this Court held that the prosecutor may “observe that the evidence against defendant is uncontroverted or undisputed even if the defendant has failed to call corroborating witnesses.” *Godbold*, *supra* at 521 (citing *Fields*, *supra* at 115). In the instant matter, defendant attempted to impeach the victim’s testimony twice, and called two witnesses to rebut her testimony that she had not known defendant before the incident. Thus, we believe that the prosecutor’s reference to the defense’s lack of a motive or reason for the victim’s purported fabrication of the story was not an improper shifting of the burden of proof. Moreover, even if it was an improper attempt to shift the burden of proof, the corrective measures taken by both the prosecution and the trial court maintained defendant’s fair and impartial trial.

Finally, to the extent that defendant contends that the separate incidents of prosecutorial misconduct merit reversal when combined, we find that defendant has still not met his burden of proving that his trial was not fair and impartial. Therefore, defendant’s final claim must fail.

Affirmed.

/s/ David H. Sawyer
/s/ Roman S. Gibbs
/s/ Gary R. McDonald